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Supreme Court of the United States

October Term, 1960

No. 756

LEO C. GONZALES,
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT

HENRY A. KIKER, JR.,
Counsel for Petitioner,
Sunshine Building,
Albuquerque, New Mexico.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, LEO C. GONZALES, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, to review the judgment of the United States Court of Appeals for the Tenth Circuit; dated and entered in this case on December 31, 1960.

OPINIONS BELOW

There was no Opinion in the District Court. The Opinion of the Court of Appeals (Bratton, Pickett and Breitenstein, Circuit Judges) has not yet been reported but appears in the Record on Certiorari at Pages 3 to 14, and a printed copy thereof is appended to this Petition. No Opinion was rendered by the Court of Appeals upon the Petition for Rehearing.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Tenth Circuit sought to be reviewed was dated December 31, 1960, and entered on the same date. (Record on Cert. 16.)

Time to petition for rehearing was extended by an Order dated and entered on January 16, 1961. (Record on Cert. 16.) Petition for Rehearing was denied by Order dated and entered January 28, 1961. (Record on Cert. 22.) On February 10, 1961, an Order was issued staying the issuance of the Mandate for a period of thirty days, and thereafter until final disposition of this case by this Court.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Must an indictment, in order to charge sufficiently the offense of making a false statement to a governmental agency, within the contemplation of 18 U. S. C., Sec. 1001, allege that such a statement is a material false statement?

2. If the materiality of such a false statement must be alleged, must it be alleged in *haec verba*, or may it be inferred from facts alleged in the indictment?

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved, and are quoted herein in full:

Title 18, U. S. C., Section 1001:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick,

scheme, or device a material fact; or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Rule 7 (c), Federal Rules of Criminal Procedure:

"(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

STATEMENT OF THE CASE

Petitioner was indicted, (R. 4-6) and convicted, (R. 25) in the District Court for the District of New Mexico, upon each of four counts charging that, while he was Manager of the Kit Carson Electric Cooperative, Inc., of Taos, New Mexico, he had made false statements and reports to the Rural Electrification Administration, upon matters within the jurisdiction of that agency, in violation of Title 18 U. S. C., Sec. 1001.

Petitioner moved to dismiss each of the said counts for the reason that none alleged that any false statement alleged to have been made by him was a material false statement. (R. 7), and that motion was denied. (R. 8.)

Thereafter, petitioner was convicted upon each of the said four counts, and appealed to the Court of Appeals for the Tenth Circuit, which affirmed the judgment of the District Court, (Record on Cert. 16) and denied petitioner's motion for rehearing. (Record on Cert. 16.) Mandate was stayed pending petition for certiorari.

Federal jurisdiction in the Court of first instance was based on Title 18, U. S. C., Section 3231.

REASONS FOR ALLOWANCE OF THE WRIT

1. Each of the questions presented herein embodies questions of Federal law which have not been, but which should be, settled by this Court.

With respect to the question of whether or not an allegation of materiality is essential to the sufficiency of an indictment charging a false statement to a governmental agency under Title 18 U. S. C., Section 1001, there is a conflict between the decisions of the Courts of the various circuits. While the portion of the statute under which indictment was brought against petitioner does not specifically require an allegation of materiality, the Courts of the District of Columbia Circuit[1] and the Fifth Circuit[2] have held that Congress intended that materiality should be an essential element of all the offenses defined in Section 1001. On the other hand, the Courts of the Second[3] and Ninth

[1] Weinstock v. United States, (D. C.) 231 F. 2d 699; Freidus v. United States, (D. C.) 223 F. 2d 508.

[2] Rolland v. United States, 5 Cir., 200 F. 2d 678, cert. denied, 345 U. S. 964, 97 L. Ed. 383, 73 S. Ct. 950.

[3] United States v. Silver, 2 Cir., 235 F. 2d 375, cert. denied, 352 U. S. 880, 1 L. Ed. 2d 80, 77 S. Ct. 102.

Circuits[1] have held that materiality is not an essential element of the offense contemplated by Title 18 U. S. C., Sec. 1001, except as to the first clause of that section. As far as petitioner's research reveals, this Court has not passed upon the question.

The second question presented is whether or not materiality, if it must be alleged at all, must be alleged specifically, or in *haec verba*, or whether it will suffice for facts from which materiality may be inferred to be alleged in an indictment. Again, it appears to petitioner that this Court has not passed upon this question.

The cases cited in the footnote above, and in the opinion of the Court of Appeals (Record on Cert. 5), indicate that there is a heavy volume of criminal litigation which involves these questions. Petitioner submits that the proper administration of the statute would be enhanced by a determination of these questions by this Court.

2. The decision of the Court of Appeals is in conflict with decisions of other Courts of Appeal holding that an essential element of an offense must be alleged with precision and certainty, and that such an element must not be left to inference from facts alleged in an indictment.

The decision of the Court of Appeals indicates that it adopted the view, contended for by petitioner, that materiality must be alleged to charge properly any offense under Title 18, Section 1001 (Record on Cert. 5), but the decision also holds that materiality need not be alleged specifically, or in *haec verba*, and that "allegations of fact which show materiaity will suffice." (Record on Cert. 7.)

Parenthetically, it should be observed that the case cited by the Court below as authority for the statement

[1]Fisher v. United States, 9 Cir., 231 F. 2d 99

quoted immediately above, *Meer v. United States*, 10 Cir., 235 F. 2d 65, lends support for that statement only if an inference is drawn to such effect from its dictum.

The real import of the holding of the Court of Appeals, it appears to petitioner, is that an essential element of an offense may be inferred from facts alleged in an indictment.

Petitioner submits that it is well established in decisions from other Courts of Appeal, which cannot be reconciled with the decision here under consideration, that, even under the simplified form of pleading provided for by Rule 7 (c) of the *Federal Rules of Criminal Procedure*, it is essential, in order for an offense to be charged sufficiently in an indictment, that every essential element of the offense must be alleged specifically, with precision and certainty, and that no indictment will suffice which relies upon inference for the assertion of an essential element of the offense sought to be charged. *Williams v. United States*, 9 Cir., 265 F. 2d 214; *Ornelas v. United States*, 9 Cir., 236 F. 2d 392; *United States v. Tornabene*, 3 Cir., 222 F. 2d 875; *Clay v. United States*, 5 Cir., 218 F. 2d 483.

CONCLUSION

It is respectfully submitted that the Petition should be granted, and that the Writ should issue.

LEO C. GONZALES,
Petitioner.

By HENRY A. KIKER, JR.,
Counsel for Petitioner.
SMITH, KIKER & KITTS,
Sunshine Building,
Albuquerque, New Mexico.

APPENDIX I

United States Court of Appeals

Tenth Circuit

No. 6468 — NOVEMBER TERM, 1960

LEO C. GONZALES, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*. — Appeal From The United States District Court For The District Of New Mexico.

Henry A. Kiker, Jr., of the firm of Smith, Kiker and Kitts, Albuquerque, New Mexico, for Appellant.

Ruth C. Streeter, Assistant U. S. Attorney, Albuquerque, New Mexico, (James A. Borland, U. S. Attorney, Albuquerque, New Mexico, with her on the brief), for Appellee.

Before BRATTON, PICKETT and BREITENSTEIN, *Circuit Judges*.

PICKETT, *Circuit Judge*.

Gonzales was indicted on five counts for making false statements to the Rural Electrification Administration[1], an agency of the United States. The false statements alleged to have been made were in written communications and reports to the R. E. A., relating to the property and finances of the Kit Carson Electric Cooperative, Inc., a corporation under contract for financing with the R. E. A. The crime

[1] The Rural Electrification Administration will hereinafter be referred to as the "R. E. A."

for which Gonzales was indicted is described in 18 U. S. C. A., §1001, as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The first clause of the statute specifically requires that the falsification described therein shall be as to a material fact, but that requirement is not included in the portion of the section under which the indictment in this case is brought. The authorities are in disagreement as to whether the falsification referred to in the second clause must be as to a material fact.[2]

We are of the opinion that the better reasoned rule, supported by the weight of authority, is that Congress intended that materiality should be an essential element of the offenses defined in Section 1001. We are in accord with the court's statement in Freidus v. United States, (D. C.), 223 F. 2d 598, 601, which is as follows:

> "One portion of §1001 refers to willfully and knowingly falsifying, concealing or covering up 'a *material*

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[2] The leading cases holding that materiality is an essential element of all offenses included in the statute are: Weinstock v. United States, (D. C.) 231 F. 2d 699; Freidus v. United States, (D. C.) 223 F. 2d 598; Rolland v. United States, 5 Cir., 200 F. 2d 678, cert. denied 345 U. S. 964. See also Sells v. United States, 10 Cir., 262 F. 2d 815, cert. denied 360 U. S. 913; and United States v. Quirk, E. D. Pa., 167 F. Supp. 462, and cases cited. The leading cases holding that materiality is not an essential element of the offense except as to the first clause of the statute are: United States v. Silver, 2 Cir., 235 F. 2d 375, cert. denied 352 U. S. 880; and Fisher v. United States, 9 Cir., 231 F. 2d 99.

fact.' On the other hand, the part here involved, without expressly mentioning materiality, prohibits 'any false, fictitious or fraudulent statements or representations.' We think, however, that this highly penal statute must be construed as requiring a material falsification. The legislative purpose strongly implies that only material false statements were contemplated, i.e. statements that could affect or influence the exercise of a governmental function. That purpose, as expressed by the Supreme Court in United States v. Gilliland, was 'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.' No perversion of a governmental function could possibly result from a false statement that was incapable of affecting or influencing such function. And the greater weight of authority in the federal courts supports the view that materiality is an essential element of the offense described by 1001." (Footnotes omitted.)

The indictment in the instant case charged the offense in the words of the statute, without an allegation that the false statements were material to the inquiry. When the words of a statute do not fully, directly and expressly set forth all of the essential elements constituting the offense described, allegations in the words of the statute are insufficient, but allegations of fact which show materiality will suffice. Meer v. United States, 10 Cir., 235 F. 2d 65.

The "Rural Electrification Administration" was created with power, among other things, to make loans of federal funds in the several states and territories, for rural electrification and for the furnishing of electric energy to persons in rural areas who were not receiving central station service. It was authorized to make loans to local non-profit cooperative corporations such as the Kit Carson Electric Cooperative, Inc., of which Gonzales was the manager,

and to take as security for the loan the property of the cooperative. 7 U. S. C. A. §901, et seq.

The indictment alleges that Gonzales, while manager of the cooperative which was under contract for financing with the R. E. A.,[1] knowingly and willfully made representations in a matter within the jurisdiction of the R. E. A. in financial and statistical reports concerning the assets of the cooperative and concerning different items of cash and other assets belonging to the cooperative, knowing the statements to be false.[2] Although the word "material" is not used in any of the counts of the indictment, we have no doubt but that the alleged facts show that each statement was material to the R. E. A.

The court instructed the jury that:

> "'. . . any matter that reflects upon the solvency, upon the assets, upon the payment of accounts, upon the cash on hand would constitute material matters in law, matters about which the Rural Electrification Administration would have a right to inquire and have a right to have true and correct information, and I further instruct you that it is not the law that the Rural Electrification would have to be influenced by the false representations. . .'"

---

[1] The contract referred to was executed by the defendant Gonzales as President of the Cooperative. This agreement provided that the R. E. A. would loan funds to the Cooperative for the purpose of constructing facilities to deliver electricity to its customers. To secure the loan, the Cooperative agreed to convey all of its property, real and personal, by mortgage or trust deed. The security, which was also executed by Gonzales, required the Cooperative to keep proper books, records and accounts of all its business affairs in accordance with good accounting practice. It was required to furnish the R. E. A. a monthly statement of its operations with an analysis of the revenue, expenses and consumer accounts for the preceding month. The charges in the indictment arose from these reports or supplements thereto.

[2] Each count specifically described the alleged false statement as to how and when made and amount involved. Each alleged false statement had to do with the solvency, the assets, the payment of accounts or with the cash position of the Cooperative.

The defendant objected to this instruction and requested that a proffered instruction be given. The court stated: "I will give your instructions if you want them given. I thought I had covered them." The Clerk was then directed by the Court to read to the jury defendant's offered instructions,[1] one of which stated:

> "You are instructed that, before you would be warranted in finding the defendant, Leo C. Gonzales guilty of any one of the counts in the indictment, it would be necessary for you to find that any false or fraudulent representation made by him to the Rural Electrification Administration was a material representation, that is, a representation or misrepresentation which influenced or was capable of influencing the Rural Electrification Administration in making a determination that it was required to make or in the performance of one of the authorized functions of that administration. . . ."

In determining whether a false statement is material, the test is whether it "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." Weinstock v. United States, (D. C.) 231 F. 2d 699, 701, and cases cited. This standard was quoted with approval and adopted by this Court in Travis v. United States, 10 Cir., 269 F. 2d 928, 937, cert. granted 363 U. S. 801. It is quite clear from the record that the trial court accepted defendant's statement of the rule in an offered instruction and intended to instruct the jury accordingly. However, the instructions as given orally did not state that in order for the alleged false statements to be material, it was necessary that they have a natural tendency to influence or be capable of influencing the

[1] It appears from the record that because of impaired eyesight, if instructions are to be read, it is the practice of Judge Hatch to direct the Clerk to read the same. There was no objection to this procedure, and no request was made that the jury be advised that these instructions had the same effect as those given orally.

decision of the government agency. When it was called to the court's attention that there was an omission of defendant's offered instruction on this subject, it was immediately corrected, at the request of the defendant. To be material, it is not necessary, as the jury was instructed orally by the court, that the false representation or statement actually influence the action of the government agency having jurisdiction. Sells v. United States, 10 Cir., 262 F. 2d 815, cert. denied 360 U. S. 913.

It is contended that this latter instruction is directly in conflict with that previously given by the court. Where two instructions are given which are in direct conflict with each other, one of which is erroneous and might have been followed by the jury, the giving of such instructions is generally said to be prejudicial. Frank v. United States, 10 Cir., 220 F. 2d 559; Haigler v. United States, 10 Cir., 172 F. 2d 986. Here there is no conflict between the two instructions. The subsequent instruction amplified the former statement as to materiality by advising the jury that to be material, the statement or representation must influence or be capable of influencing the R. E. A. in making a determination in the performance of one of its functions. The latter eliminated as immaterial those statements or representations which the jury found did not influence or were not capable of influencing the R. E. A. in making a decision relating to the handling of the accounts of the Kit Carson Electric Cooperative. But, even if there was a conflict in this instance, the defendant was not prejudiced. The additional instructions were given to rectify omissions and to make corrections in the oral instructions which were called to the attention of the Court by the defendant. The purpose of requiring specific objections to instructions is to afford the trial court an opportunity to correct errors. Rule 30, Fed. Rules Crim. Proc.; Hayes v. United States, 10 Cir., 238 F. 2d

318, cert. denied 353 U. S. 983; Palmer v. United States, 10 Cir., 229 F. 2d 861, cert. denied 350 U. S. 996.

Gonzales also raises the question of whether the alleged false or fraudulent statements had to do with matters within the jurisdiction of the R. E. A. He asserts, in effect, that unless the R. E. A. was authorized by law, rule or regulation to require him to furnish the information contained in the statement, they were not matters within the jurisdiction of the R. E. A. The purpose of the statute is "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described," (United States v. Gilliland, 312 U. S. 86, 93), the realm of the agency jurisdiction must be broader than that suggested. We believe that, for these purposes, jurisdiction is properly defined as follows:

> "Jurisdiction means the right to say and the power to act; and, as between agencies of the government, jurisdiction is the power of that particular agency to administer and enforce the law." — Carroll Vocational Institute v. United States, 5 Cir., 211 F. 2d 539, 540.

The record in this case establishes that the R. E. A. is a lending agency of the United States Government, and the Kit Carson Electric Cooperative, Inc. was a borrower from the R. E. A. The loan agreement was contained in an indenture and a deed of trust which required the submission of monthly financial reports to the R. E. A. The false statements with which Gonzales was charged were made in these monthly reports and, in one instance, in response to an inquiry from the R. E. A. Under the terms of the loan agreement, the R. E. A. had the right to say what information the borrower should submit, and had the power to act on the information submitted. There can be no question concerning the authority of the R. E. A. to administer and enforce the

law under which it was created. There was no error in the denial of Gonzales' motion for acquittal which was premised on the ground that the United States had not established that the statements were made in a matter within the jurisdiction of the R. E. A.